

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944.

No. 377

PRECISION INSTRUMENT MANUFACTURING
COMPANY, KENNETH R. LARSON and SNAP-
ON TOOLS CORPORATION,

Petitioners,

vs.

AUTOMOTIVE MAINTENANCE MACHINERY CO.,

Respondent.

**PETITION FOR REHEARING, OR REFORMATION
OF OPINION.**

FRANK PARKER DAVIS,

Attorney for Respondent.

ALBERT J. SMITH,

Of Counsel for Respondent.



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Now comes respondent and petitions for a rehearing or, in the alternative, for a reformation of the majority opinion with respect to a number of erroneous factual statements therein which underlie the conclusions and most gravely reflect upon Automotive and its attorney.

Preliminarily we observe that the opinion is based upon the proposition that the Larson application itself was of "fraudulent ancestry", and that it was against the public interest for Automotive to acquire and prosecute it to patent when not reporting to the Patent Office the suspected perjury in the interference in which the application

had been involved, or how Thomasma figured in the inception and development of the new wrench.*

This quite overlooks the fact that the application *as filed* did not claim the invention which was the subject of the interference, nor anything else that was Zimmerman's—and that, when priority as to *that* invention had been conceded to Automotive's inventor and the application was assigned to Automotive, the interference claims were promptly cancelled and continuing prosecution pertained to Larson's true invention of a distinct though narrow improvement upon the then concededly prior invention of Automotive's inventor, Zimmerman.

None of the defendants ever pleaded *fraud* or *unclean hands* in the filing of the Larson application or in Automotive's prosecution of it, on the ground that Larson was not the inventor of what was claimed originally therein or what was claimed in the patent as issued, though Snap-On had pleaded, "on information and belief" that the invention "was acquired" by Larson from Thomasma and also that it was their "joint contribution" (R. 21).

The original application and claims were not even before the District Court when its Findings of Fact and Conclusions of Law were entered June 12, 1943. A certified copy came in as Plaintiff's Exhibit 64 by stipulation of August 6, 1943 (R. p. 913). Naturally no Finding on the subject was proffered and the District Court made none. Defendants did urge on appeal that the Larson application should have been filed jointly by Larson and Thomasma, but the Court of Appeals declared "This record does not warrant such conclusion . . ." (R. 1223).

*At page 2 the opinion reads as though the interference claims were in the Larson application as filed which is not the fact. They were suggested to Larson by the Patent Office when his application had been pending for some considerable time. They came from Zimmermann's prior applications.

Such being the situation the factual errors of the majority opinion with which we shall deal have mainly to do with the status of the Larson application as filed and the genesis of the wrench disclosed therein and its development at the hands of Larson and Thomasma.

We shall show by the record that the application was properly filed in Larson's name and contained no fraudulent claims whatever, and that its prosecution at the hands of Automotive pertained to the invention *that was justifiably claimed in the application as filed*, so that nothing whatever occurred inimical to the public interests as a result of its being "turned into a patent," to use the Court's expression.

[1] At page 2 of the printed opinion we find this erroneous statement concerning collaboration of Thomasma and Larson:

"Together they worked out plans for a new wrench, although Thomasma claimed that it was *entirely* his own idea."

Not even defendants ever contended that Thomasma so claimed. Then on the last page of the printed opinion we note the phrase used in reference to the Larson application,—*"the application's fraudulent ancestry,"* which we interpret as reflecting the Court's conclusion that Larson had no standing at all as a legitimate applicant for a patent upon the torque wrench disclosed in that application.

This apparently derives from testimony of Thomasma *at trial* (R. 323) where, on examination by defendants' counsel, he spoke as follows:

"Q. You did tell Mr. Fidler on November 7, 1940 that you were responsible for the subject matter of

*Emphasis ours here as elsewhere in quoted matter unless otherwise indicated.

the Larson Application, is that correct, that you were the inventor of whatever had been done you done?

A. I conceived the idea, if that is what you mean?

Q. You were the *father* of the idea?

A. It was my conception."

Assuming that "father of the idea" means more than a mere suggestion that a wrench be invented, it is impossible to understand how Automotive can be charged with knowledge in 1940, or 1941, or 1942 for that matter, of what Thomasma or anybody else would later say at the trial in May, 1943. Automotive and its attorney inevitably must be judged only on the information they actually had at the time the settlement was made in December, 1940. It is to be borne in mind that not only Automotive and its attorney but Snap-On and Alberts at the time of the settlement considered the Larson application, aside from the interference counts, later cancelled, to be directed to the sole invention of Larson. Snap-On and Alberts made no contention to the contrary and, indeed, nothing occurred thereafter to warrant a contrary belief. The application was assigned to Automotive on the assumption that it was based upon Larson's sole invention.

What is said in the majority opinion, at printed page 3, as to Thomasma's having "stated that he developed Larson's wrench and that Larson's patent application was a 'frame-up'," is evidently derived from Mr. Wacker's letter to Mr. Fidler (Defendant's Exhibit 11, R. p. 924) reporting upon the interview of November 3, 1940 with Thomasma and his attorney Kriehner who were endeavoring to sell Thomasma's stock in Precision to Automotive.

Why this should be accorded any particular evidential value we fail to see because shortly after this Thomasma swore to facts showing that Larson had very much to do

"on his own" with the development of the wrench, as we shall presently show by quotations from the Thomasma affidavit which occupies pages 952 to 1012, Vol. II, of the record.

In the course of that sworn statement of what he told Fidler he certainly did ~~not~~ claim that the "new wrench . . . was *entirely* his own idea." On the contrary, he accredited Larson with having contributed *most of what went into that wrench*.

We quote a number of passages from the Thomasma affidavit telling of his first talk with Larson. He said:

"I think all I had to show was a socket and a piece of drill rod and a socket wrench handle." (R. 962).

These were simply pieces he brought from the Automotive factory. He then stated:

"I suggested that we put a dial mechanism of *some sort* on there to measure the amount that this rod would bend. From my description, he then saw the picture of what I meant. He made the pattern *on his own* for the first casting and from there on we worked together *on the machining* of it and the *machining* of parts" (R. 962-3).

And further:

"Q. Did you see Larson make those first patterns?

A. I didn't see him make them. *He made them on his own. I did see the patterns when they were finished*" (R. 963).

This is important because it concerns the development of a very essential part of the wrench, to wit, a slide and swivel bearing *intermediate the ends of the tension rod*, and it is perfectly clear from what Thomasma related in his affidavit that this was a matter left entirely to Larson. For exam-

ple, Thomasma answered Fidler's questions as follows (R. 977):

"Q. Did you have any idea of how you would support it so that it would be free to pivot and slide?

A. Yes, I had in mind that it would slip through a hole in a bearing of some sort that would support it.

Q. You didn't have in mind any particular kind of bearing at that time?

A. *Nothing definite.*"

Another contribution of Larson's, and the one which brought the wrench to satisfactory condition, was the so-called "tail piece" in the form of a reduced extension of the tension rod, constituting the vital element in the connection of the free end of the tension rod with the indicator. We may say that throughout this case it has been *conceded that this was conceived of by Larson and by no one else.*

At this point we quote further passages from the Thomasma affidavit, concerning how far he had gotten when he went to Larson:

"Q. You didn't have a *complete* wrench in any sense of the word at that time?"

A. *Only the idea that I had something to work on*" (R. 978).

Just previously in that affidavit he was asked and answered Mr. Fidler's questions as follows:

"Q. Did you know at that time what kind of gauge structure you would use?

A. *I wasn't definite about gauge structure.*

Q. Did you have any idea where to locate the gauge structure?

A. As near to the handle as you could possibly put it.

Q. Could you still connect it the same way that AMMCO did?

A. No, on account of theirs being connected in the center of the wrench and to put it at the end you would have to have some other means of hooking it up to get the movement.

Q. Had you worked out anything like that at the time you first told Larson about it?

A. *Nothing definite, although I had given some thought to it. I hadn't worked anything definite out.*

All of these things were worked out by Larson, as the record clearly shows. In fact, the only things that Thomasma told Fidler were his, Thomasma's, own ideas were the putting of the indicator, "on the case instead of on the cover," locating it "as near to the handle as possible" so that it could be seen" (R. 969), and fitting the spring bar directly into the head member (R. 1007).

All of this was very far from conception of a complete wrench structure, and upon Thomasma's own sworn statement, Larson was the one who carried through to completion and successful form "on his own" the wrench structure upon which the patent application was founded.

Let us see then what Thomasma said in his affidavit, about the filing of the application (R. 1002-3):

"Q. That particular improvement that was covered by the application, whose improvement was that? Who made the suggestion respecting the reduced end piece connecting with the gauge?

A. *Larson made that.*

Q. Therefore, it was proper for the application to be filed in his name?

A. That's right.

Q. Suppose that the application was to have covered just the idea of the head piece and the straight spring bar, one end fixed to the head piece and the other end connected to the casing by a swivel in which the spring bar would slide, in whose name should such an application as that have been filed?

A. Really, that should have been filed in my name.

Q. It is *because of the end of the spring bar being fitted directly into the head member*—

A. That was my idea.

Q. Suppose that application had covered merely the idea of a rotatable head member in the casing and a spring bar connected at one end to that head member in some way through a forging or any other way, broadly, with a swivel at the other end and the spring bar sliding in it, in whose name should that application be filed?

A. That, in my opinion, would be the property of the *Automotive Maintenance Machinery Co., and Zimmermann, as engineer, would be the inventor of the same.*

Q. Then, in your mind, it was *perfectly proper for Larson to file the application in his name* if he limited it to that improvement that they had decided was patentable?

A. That's right.

Without further reference to the record, the foregoing is enough to demonstrate the error of the first above quoted statement in the majority opinion as to Thomasma's having claimed that it was *entirely* his own idea. Thomasma's own affidavit which was introduced in evidence by the defendants runs quite to the contrary, as the quotations we have made from that affidavit definitely demonstrate.

And let it be remembered here that defendants took the position before this Court,—not that the new wrench was “entirely” Thomasma’s “own idea,” but that Larson and Thomasma were joint inventors, stating in their brief, at p. 47, “if there was invention it was the joint invention of Larson and Thomasma.”

We shall next refer to the testimony of Alberts who prepared and filed the Larson application. While the record does not show that he then knew anything about Thomasma’s part in the project of devising a new wrench or in developing the same, he, Larson, testified at trial in reference to a letter which he had written to Thomasma’s attorney, Krichiver, as follows (R. 465):

“Q. What was the occasion of writing this letter?

A. The purpose of that letter was precisely what I have testified to a moment ago, that as far as up to that time, January 31, 1941, which was prior to the date that Thomasma testified on adverse, which was prior to the time he testified in this court, and the only knowledge I had was the knowledge he had given on November 28, 1940* in response to the questions of Mr. Fidler, and then he acknowledged that the greater part of the work on that wrench was done by Larson; that Larson’s idea was to place the indicator in the handle end of the wrench, put an extension on the flexible-beam to translate the flex of the beam to such an extent that a more accurate performance could be acquired in taking measurements or viewing the indicator to register those measurements; that that part of the wrench was his invention.

Thus it appears that after Alberts had been fully informed concerning all claims made by Thomasma as to his part in the project, as related in the Thomasma affidavit

*This was when Thomasma told his story in the presence of Alberts and Snap-On’s president Johnson and Fidler and Wacker.

and repeated by Thomasma in the presence of Alberts, he, Alberts, was of the opinion that the application was properly filed in Larson's name and he, be it remembered, was a witness testifying on behalf of the defendants and had been attorney for Larson and Precision and Snap-On.

It should here be observed that all of the claims which Alberts put into the Larson application as filed pertained to the so-called "tail piece" feature, which was concededly Larson's contribution. This feature involved means connecting an extremity of the spring beam with means for indicating the pressure applied. Claims 1 to 5, 7 and 8 of Larson's original application are directed broadly to this feature. For example, claim 1 defined this feature "calibrated indicating means operatively connected to an extremity of said resisting beam to measure the flex of said torque resisting beam," while claims 2 to 5, 7 and 8 define it in equivalent language, such as "calibrated indicating means operatively connected to the free extremity of said beam" (claim 3). The tail piece is a vital element of these connections and any proper interpretation of these claims must include it, though not necessarily limiting them to its being an individual piece. The specification states that it may take the form of a reduced integral extension of the beam (R. 1152: spec. p. 2, col. 2, ll. 2-14). The remaining and more specific original claims do define this feature as "a smaller rod projecting from the free extremity of said elongated rod [spring beam]." Certainly there was no "fraudulent ancestry" as to any of these original claims.

We shall deal later on with the claims which appear in the Larson patent and show that there is nothing whatever of "fraudulent ancestry" about them either.

We pause to remark that where two or more individuals collaborate in the development of an idea, a difficult question

often presents itself as to whether one or another or two or more jointly should apply for patent. In the instant case a joint application by Larson and Thomasma might have been justified, since Larson carried along some of Thomasma's ideas. On the other hand the claimed combinations were of Larson's invention and it was his own contributions which made the wrench operative and successful. Certainly upon the facts as revealed by the record an application in Thomasma's name alone would have been improper, for it is perfectly clear that he came to Larson with only an embryonic incomplete idea and that by far the major portion of the work of development was done by Larson in embodiment of his own ideas.

Wherefore, we think that Alberts was quite justified in taking the position he did at trial as to the application having properly been filed in Larson's name alone.

It follows that the censure of Automotive and its attorney, as in the majority opinion of this Court, is wholly unwarranted on the basis of any "fraudulent ancestry" of the Larson application. Neither Automotive nor its attorney had reason to disbelieve in Larson's parentage at the time of Automotive's acquiring the application or at any time thereafter.

Let us now consider the apparently aspersive statement in the majority opinion that "Automotive then made numerous changes and expansions as to the claims in the application and eventually secured a patent on it," and see just what was done and whether any of the claims of the patent transcend what was properly claimable as the invention of Larson.

There certainly can be no question as to claims 4, 6 to 12, inclusive, 15 to 17, inclusive, and 22 to 25 inclusive, for each of them specifies Larson's conceded contribution of the

tail-piece termed "a smaller rod" in some of these claims and "an extension" in others. Claim 13 does also in its final clause, and the same element is embraced in the final clauses of claims 14, and 18 to 21, inclusive, and claims 27 to 32. The "numerous changes and expansions" did not broaden the scope of the original claims, nor did any one of the claims which issued define other than that which was attributable to Larson's work.

Claim 26 of the Larson patent does bring into prominence a feature asserted by Thomasma to have been proposed by him, to wit, the putting of the indicator "on the case instead of on the cover," but still it was Larson who worked out the claimed combination. The bare idea of transferring the indicator represented no *inventive* contribution to that combination, and it was Larson and not Thomasma who contrived the necessary co-relation of case or "elongated body member," "head member," "yieldable-torque resisting beam," "indicating means," and "detachable cover plate," whereby to create a satisfactory wrench, one with the indicator accurately "operable upon relative rotation of said rotatable members." Larson's conceded contribution of the tail-piece was the thing chiefly responsible for achievement of that result.

Moreover, Larson contributed the idea of eliminating the bearing in the cover and having the case alone supply a bearing in which the head was journaled. We quote from Larson's deposition in the interference proceedings (Defendant's Exhibit 10, p. 48):

"A. I eliminated the bearings, top and bottom on the head member and put the bearing entirely in the case so that the cover had nothing to do with the operation, or bearing on the head at all. The tool worked the same with or without the cover.

Q. 305. You mean in the cover plate?

A. The cover plate, yes, sir."

Thomasma's idea was to have bearings for the head in both cover and case, as in the AMMCO wrench (R. 980-81).

Claim 26 should be construed as extending to Larson's contribution of the single bearing in the case which provided for removal of the cover "without disturbing the operative relationship of the wrench parts" as the claim recites.

In conclusion on this topic, we maintain that Fidler's prosecution of the Larson application was entirely proper, the "numerous changes and expansions as to the claims" having been fully warranted upon the basis of what had been originally claimed.

We are not at all unmindful of the Court's emphasis on Automotive's prosecution of the Larson application "without ever attempting to reveal to the Patent Office or to anyone else the facts it possessed concerning the application's fraudulent ancestry." We have shown from the record that it had no "fraudulent ancestry."

The only fraud concerned with it was that practiced by Larson in falsely swearing to his inventorship of Zimmerman's claims suggested to him by the Patent Office, and the perjured testimony by which he sought to antedate Zimmerman. It was enough for the Patent Office that he conceded priority to Zimmerman. He did not thereby disentitle himself to patent his own invention of an improvement over Zimmerman. The status of his application in that regard would not have been affected at all by the Patent Office having knowledge of the fraud. There was, therefore, no reason why the Patent Office should have been informed about it.

Fidler had taken counsel with a prominent patent lawyer of Washington, D. C., on the matter of informing the Patent Office about it before the concession of priority was made, and was advised against it and for very good reasons (R. p. 760). The point is that the continuing prosecution of the application, absent the false claims, would not have been barred in any way by the perjury concerned solely with those claims.

Then it would have been irregular, under Patent Office practice, for consideration to be given *ex parte* to the subject of inventorship as related to Thomasma's participation in the inception and development of the wrench upon which Automotive's solicitor was prosecuting claims for the improvements over Zimmerman. Automotive had set out to introduce proofs in the interference in the hope of showing fraud in the evidence Larson had produced but there was no longer any occasion to do that when Larson had conceded priority to Zimmerman.

The Patent Office does not concern itself with reasons for a concession of priority in an interference proceeding. Knowledge of its having been done because of falsity of proofs of inventorship of the *interference subject matter* would not have changed the situation one whit as to continuing prosecution of the application by Larson or an assignee confined to what lay outside of the interference issue, and so was unaffected by the concession.

Automotive's patent solicitor took up the prosecution of the application, and properly did so, entertaining the very same view voiced by Alberts at trial, viz., that the application had been justifiably filed in Larson's name alone. Opinions might differ as to that but the *judgment* of Alberts and Fidler was that a *sole* and not a joint invention was being claimed. Even if that *judgment* was wrong, no criminality about it could justly be found.

Being satisfied that the application had been properly filed in Larson's name, and that resumption of its prosecution to patent upon the improvement which was in fact his invention, we are quite unable to see how a duty rested upon Automotive, as assignee, to report to the Patent Office either the facts of Larson's fraudulent claim to Zimmerman's invention or the facts of Thomasma's participation in the development of the wrench.

The majority opinion, in item 1 of its conclusions, p. 9, appears to confuse these matters, creating the impression that respondent seeks to excuse performance of an "uncompromising duty" to report to the Patent Office the fraud as to the interference subject matter, on the score of reasonable doubts about sufficiency of the proof. *But that has nothing to do with prosecution of the Larson application as confined to that of which he was the rightful inventor.* So why burden the Patent Office with consideration of proofs concerning an interference issue already disposed of by concession of priority? It would have been a perfectly idle ceremony for the Patent Office to "pass upon the sufficiency of the evidence."

Is it to be wondered at that we cannot reconcile ourselves to Automotive and its attorney having been found by this Court to have done wrong in acquiring the Larson application and prosecuting it,—not for anything that Larson had falsely claimed as his which belonged to Zimmerman, but for what was developed by Larson himself in furtherance of an incomplete idea submitted by Thomasma?

Let it be assumed, if the Court please, that Fidler and Alberts as well, were wrong in their *judgment* that Larson was entitled to claim to the full extent as in the original claims, or in the claims of the patent as issued, because some certain claim or claims may have expressed what

was the joint invention of Larson and Thomasma, can it be that a finding of felonious intent is predicable upon such mistake of judgment? Yet there it is in the majority opinion where it reads, immediately following the phrase "fraudulent ancestry",—"Automotive thus acted to compound and accentuate the effects of Larson's perjury"!

There was no perjury in the filing of the Larson application and how, may we ask, could Automotive be compounding the perjury that had been committed by Larson, *et al.* in the interference, by prosecuting the Larson application *absent entirely the perjured claims*? How does one compound or accentuate a perjury by acting without any relation to it and deriving nothing whatever by reason of any concealment of knowledge of it?

The Patent Office ignorance of the perjury had nothing to do with the granting of the Larson patent. The Patent Office would have no right to refuse a patent for Larson's improvement over Zimmerman, on the ground that Larson had once falsely claimed Zimmerman's invention. The granting of the Larson patent could have no effect to class the Patent Office or the public "among the 'mute and helpless victims of deception and fraud'."

[2] At several places in the majority opinion the patents in suit are referred to in the plural as though *all* were affected by Larson's perjury. For example, at printed page 8 of the opinion we find this statement:

"The history of the patents and contracts in issue is steeped in perjury and undisclosed knowledge of perjury."

Since there was no perjury in connection with the Zimmerman inventions or the applications for patents thereon

or the prosecution of those applications or the issuance of Zimmerman patents, we fail to see how the latter can be "steeped in perjury and undisclosed knowledge of perjury", or affected in any way by Larson's perjury in seeking to antedate Zimmerman's invention, or how it can be that these Zimmerman patents are affected by any "undisclosed knowledge of perjury".

In the same paragraph of the opinion it is stated that Automotive "acquired the Larson application itself, turned it into a patent and barred the other parties from ever questioning its validity". We have already reviewed the proceedings had in the Patent Office after Automotive acquired the Larson application and have demonstrated that it was not "turned into a patent" in any way connected with or influenced or aided by the perjured Larson proofs in the interference, so that lack of knowledge by the Patent Office of the perjury had nothing whatever to do with the result of the prosecution of the application at the hands of Automotive.

How there could be anything iniquitous or non-conformative with "minimum ethical standards" in defendants' being committed to the validity of Larson's patent, we fail to comprehend, considering that as assignors they would be legally estopped in that regard.

[3] We next comment upon another erroneous statement in the same paragraph of the opinion reading:

"Larson's application was admittedly based upon false data which destroyed whatever just claim it might otherwise have had to the status of a patent."

We would be much interested to be informed of how or when or where in the record any such admission by plaintiff or any of its representatives is to be found. We have

already shown by the record that the application was *not* based upon false data, and there certainly never has been any admission of any kind by Automotive that it was. On the contrary Automotive has all along contended, and was supported in that contention by the Court of Appeals of the Seventh Circuit, that *as filed* the application was properly made in Larson's name. Further, as pointed out hereinbefore, that was the view expressed by defendants' attorney Alberts when testifying at trial.

We surmise that the "false data" referred to is that which had to do with claims which were adopted by Larson at the suggestion of the Patent Office for purposes of interference,—these being claims taken from the applications of Zimmerman. How this could operate retrospectively to invalidate the application altogether, transcends our understanding. With those false claims stricken from the Larson application, there was left properly claimable subject matter of *Larson's own invention* as an improvement over Zimmerman, and the application was prosecuted at the hands of Automotive *strictly upon that basis*. Therefore, we quite fail to see how "whatever just claim" the application had to the status of a patent upon *that* improvement could be destroyed by the mere fact that claims to something else were false and had been relinquished. Neither can we see how Automotive acted "in disregard of the public interest" in taking the patent upon what truly was Larson's invention.

[4] Pursuing the same subject, we find this sentence in the opinion, beginning at the bottom of printed page 8:

"The important fact is that Automotive had every reason to believe and did believe that Larson's application was fraudulent and his statements perjured."

There is nothing of record to show that Automotive entertained any such belief as to the Larson application *in toto*

but, on the contrary, it was believed to be a proper enough application *insofar as it covered Larson's invention as an improvement upon Zimmerman*. The belief as to "his statements" being "perjured" had solely to do with his false claim to the Zimmerman invention. Automotive did not, therefore, act in "complete disregard" of any belief that Larson's application itself was fraudulent.

We also respectfully challenge the Court's statement that

"Automotive knew of and suspected the perjury and failed to act so as to uproot it and destroy its effects."

We have shown that the "perjury" referred to had nothing to do with the Larson application as filed. The "perjury" pertained to the interference counts, and certainly that perjury was uprooted and its effects destroyed most effectively by cancelling the interference claims from the Larson application, and confining continued prosecution to claims for Larson's own invention.

[5] Since the majority opinion finds it unnecessary to "speculate as to whether there was sufficient proof to present the matter to the District Attorney," we need not dwell upon the fact that Automotive refrained from presenting the matter to the District Attorney on the advice of the two different attorneys whom Mr. Fidler consulted. But, noting the statement at page 10 of the majority opinion with reference to reprehensible actions of Larson and Precision, we are moved to comment that the net result of the litigation is to reward them and Snap-On Corporation by permitting them to profit by the perjury in their own ranks. Thus the attempt having failed to rob Automotive of the Zimmerman invention upon which it had built up a substantial business in the sale of wrenches to

Snap-On Corporation, and the contracts of settlement having been made whereunder Automotive's patent rights were to be respected, defendants were found to be continuing the manufacture and sale of wrenches which Automotive believed to be infringements of the patents and in violation of the contracts. Suit having been brought upon that basis, defendants, by way of thwarting Automotive's enforcement of its rights, had recourse to capitalizing upon perjury in their own ranks and have now succeeded in accomplishing their nefarious purpose by that devious method.

Of course we concur in the equitable principles set forth in the majority opinion. That to which we take exception is the *factual* basis of the opinion for application of those principles, which basis we believe we have shown to be distinctly erroneous.

Consequently, we consider the conclusion unjustified that Automotive's patent claims were "infected with fraud . . . too great to be overridden" by the "more reprehensible" actions of Larson and Precision. And we most certainly fail to perceive how "Automotive acted affirmatively to magnify and increase those effects", i.e., the effects of suspected perjury.

Automotive did "act so as to uproot it and destroy its effects", not only by cancelling the false claims from Larson's application, but promptly upon Larson's admitting the perjury on pre-trial examination before the District Court, by suggesting to that court a reference to the District Attorney (R. 118).

We submit in conclusion that the true facts of the case as shown by the record are not such as to support the conclusions of the majority opinion which so seriously effect

upon the reputation of Automotive and its attorney, and that whatever comes of this present petition, common justice cries out at least for rectification of the damaging factual statements of the majority opinion which we have shown to be erroneous.

Respectfully submitted,

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ALBERT J. SMITH,

Of Counsel.

I hereby certify that the foregoing Petition is presented in good faith and not for delay.

FRANK PARKER DAVIS.